SUPREME COURT, U. S.

FILED

APR 24 1975

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1340

HOTEL, RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 5, AFL-CIO, *Petitioner,*

vs.

INTER-ISLAND RESORTS, LTD., d/b/a KONA SURF HOTEL, and ILWU, LOCAL 142,

and

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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April, 1975

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PETITION FOR WRIT OF CERTIORARI
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for the Ninth Circuit

The Petitioner, Hotel, Restaurant Employees and Bartenders' Union, Local 5, AFL-CIO (Local 5) respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit made and entered in this proceeding on November 26, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A (p. i, *infra*).

The opinion of the NLRB, 1973 CCH Decisions par. 24,948, 201 NLRB No. 1, appears in Appendix B (p. v, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1974. This Court extended the time for filing the petition for Writ of Certiorari to April 25, 1975 (Appendix C, p. xi). This petition was filed within the extended time period. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the NLRB correctly held some showing of interest by a petitioning union is sufficient to require an election and whether the NLRB's finding is an administrative matter, not subject to direct or collateral attack.

STATEMENT OF THE CASE

This case arises out of the rival organizational campaigns waged among the employees of the Kona Surf Hotel by the ILWU and the Hotel, Restaurant Employees and Bartenders' Union, Local 5, AFL-CIO (herin "Local 5"). Briefly, the Board found that the

Company and the ILWU prematurely entered into a union security contract at a time when an election petition filed by Local 5 had raised a real question of representation, and that this and other similar conduct constituted unlawful support and discrimination on the part of the Company and unlawful restraint and coercion on the part of the ILWU. The facts underlying the Board's findings were for the most part stipulated by the parties and are summarized below:

The Company is a Hawaii corporation and operates a chain of hotels in the State of Hawaii. In 1970, the Company began construction of the Kona Surf Hotel in Kailua, Kona, on the island of Hawaii (R. 78;66). The hotel was scheduled to open in the fall of 1971 (R. 78;66) and in fact opened on September 23 (R. 4, n. 21). The employees were primarily obtained from the graduating class of a hotel school operated by the State (R. 67), and these employees were formally placed on the payroll for the first time on September 3 (R. 79; 4, n.2, 67).

The ILWU represented the employees at the six other hotels operated by the Company, and on August 20, prior to the opening of the hotel or the formal hiring of any of the employees, ILWU Representative Eddie M. Tangen requested that the Company consider the Kona Surf as an accretion to the existing unit and on this basis recognize the ILWU as bargaining representative for the new hotel. Company Director of Industrial Relations James Peltier rejected this request, and informed Tangen that any recognition would have to be based either on a cross-check of union au-

thorization cards or on an election conducted by the Board (R. 78;66, 70).

Local 5, had notified the Company of its interest in organizing the Kona Surf the previous June, and on August 27, a week after the ILWU request based on accretion, Local 5 requested recognition from the Company based on a cross-check of union authorization cards. That same day the Local 5, filed a representation petition with the Board's Sub-Regional office in Honolulu (R. 78-79; 66-67). As the Company stated before the Board, at the time it "had not yet completed the rounding out of the complement of its employees", and no employees were formally on its payroll (R. 79; 4, n.2, 67).

Company Industrial Relations Director Peltier therefore advised the Board on Monday, August 30, the Board requested Local 5 to withdraw its petition and to refile it when the Company had employees on its payroll (R. 79;67).

Five days later, on Friday, September 3, the Company formally hired 95 employees and placed them on its Kona Surf payroll. About noon of the same day, ILWU Representative Tangen called Industrial Relations Director Peltier at the Company's headquarters in Honolulu and requested recognition based on a card check. Peltier promptly arranged a meeting for that afternoon at which the ILWU could prove its claim to majority status. Company and ILWU representatives did meet that afternoon in Honolulu, but because the Company's Honolulu office had no means by which to verify the signatures of the ILWU cards, the par-

ties agreed to postpone the card check until the following morning when tax forms signed by the new Kona Surf employees could be sent over from Kailua, Kona. The Company and the ILWU arranged for Mr. Mack Hamada, Chairman of the Hawaii Public Employment Relations Board, to be present to conduct the card check (R. 79;67).

About 4:15 p.m. of this same Friday afternoon, Local 5 withdrew the representation petition it had filed with the Board the week before and simultaneously filed a new petition which it accomplished with cards constituting a new showing of interest. A representative of Local 5, notified the Company of the filing of the new petition, and ILWU Representative Tangen learned of the filing of the petition as a result of a call he made to the Board's office at the time of the filing (R. 79;68).

Notwithstanding their knowledge of Local 5's new petition, the Company and the ILWU met as planned on Saturday, September 4, the first day of the long Labor Day weekend, and Mack Hamada conducted a cross-check of the 87 authorization cards submitted by the ILWU. Hamada determined that three of the card signers were not on the Company's payroll list of 95 employees, but validated the remaining 84 cards, and the Company thereupon recognized the ILWU as representative of the newly hired Kona Surf employees. At the same time, the parties entered into a collective bargaining agreement which was indentical to the master agreement in effect at the other six Company hotels where the ILWU was the representative.

This contract contained a union shop clause which, among other things, made it a condition of employment that all employees who were then members of the ILWU remain members and that all other employees become members on the 31st day following execution of the contract or their date of employment, whichever is later. The contract further required that the Company discharge employees who failed to tender their dues and initiations fees. About the same day, in accordance with established practice under the master agreement, Company Personnel Director Leslie M. Mizumoto began distributing ILWU dues check-off authorizations to the Kona Surf employees (R. 79-80; 68-69, 70-71).

On Tuesday, September 7, the day after Labor Day, the Board's Sub-Regional office conducted a pre-hearing conference in order to determine whether Local 5's petition was supported by a sufficient number of employees to warrant further processing. As the Company pointed out before the Board, both at the time of the August request for recognition and the new petition, Local 5 was under the erroneous impression that the unit consisted of 60 employees, and at the pre-hearing conference, Local 5 submitted 36 authorization cards—an apparent majority in the supposed unit of 60. However, when the cards were checked against the payroll list of 95 employees constituting the actual unit, the names of 12 of the card signers were not on the list, and the 24 valid cards remaining represented an interest in the Hotel Employees on the part of only 25 percent of the employees, or less than

the 30 percent showing of interest which the Board normally requires in order to process such a petition. Local 5 was given 48 hours to present the requisite showing of interest, and the following afternoon submitted 10 additional authorized cards, for a total of 34 cards, or 36 percent of the unit (R. 80; 69). Inasmuch as all but 11 of the 95 employees had signed cards for the ILWU, it was apparent from the fact that Local 5 secured 34 valid cards from those same 95 employees that at least 23 employees signed cards for both unions (R. 85, n.11).

On September 23, the Kona Surf Hotel opened for business. On September 28 a Board hearing was held on Local 5's representation petition. Three days later, pursuant to a reopening clause in their contract, the Company and the ILWU began negotiations concerning the wages to be paid the employees at all seven of the Company's hotels (R. 80, 81; 69, 70). On October 21, the Regional Director for the Board's 20th Region issued a Decision and Direction of Election in which he determined that the Local 5 petition had raised a question concerning representation, that the Company's September 4 contract with the ILWU did not constitute a bar to an election, and that an election among the relevant employees at the Kona Surf Hotel was therefore appropriate (R. 80-81; 4-5, 69). The Company's request that the Board review this decision was denied by the Board on December 3 (R. 81; 70).

The election was scheduled for December 21. On December 16, five days prior to the election, the Company notified all its employees that the wage negotia-

tions with the ILWU had been concluded and that the new wage rates would be put into effect retroactively to October 1. The Company further stated that the employees would receive checks for their retroactive pay as soon as they could be processed, subject, however, to approval of the increase by the Wage Board. When the election was held, 62 votes were cast for the ILWU, 27 votes were cast for Local 5, and 1 vote was cast against both unions. One ballot was challenged (R. 81; 69-70). Following the election the Company and the ILWU began requiring the Kona Surf employees to execute dues check-off authorizations as a condition of their continued employment (R. 86; 27, 40), and on February 1, 1972, the Company began deducting ILWU dues from the paychecks of the Kona Surf employees (R. 82; 70).

On January 10, 1973, the NLRB found that the provisions of Section 8 (a)(2) and 8 (a)(3) of the Act and that ILWU violated Section 8 (b)(1)(A) and (2) of the Act by accepting recognition and by enforcing the union shop provision in the contract.

The NLRB set aside the election and ordered a new election. On November 24, 1974, the Court of Appeals for the Ninth Circuit denied enforcement of the Board's order.

REASONS FOR GRANTING CERTIORARI

1. THE DECISION BELOW AND THAT OF OTHER COURTS OF APPEALS CONFLICTS WITH THE LONG ESTABLISHED POLICY OF THE NLRB.

As the Court of Appeals stated in its decision denying enforcement, there has been a long standing conflict between the NLRB and the United States Courts of Appeals regarding the Board's policy of requiring the issue of representation to be decided by the employees in an election:

> "The Board's decision and order itself explicitly recognizes the conflict between its decision and the great weight of authority in the Courts of Appeals but mentions that it chooses to adhere to its view until such time as the United States Supreme Court has passed on the matter. See footnote 12 of the Board's Order 201 N.L.R.B. No. 1. The Board's position reflects its belief that the purposes and policies of the National Labor Relations Act require that the issue of representation be decided by the employees in a manner attended by the safeguards of the Board's election machinery. However, based upon the record before us indicating that the Inter-Island's recognition of the ILWU was based upon a clear demonstration of majority support, we conclude that the Board's need to preserve the integrity of its election machinery must yield to the rights of the Kona Surf employees to select and bargain through their own representatives. See Playskool, Inc. v. N.L.R.B., supra, 70."

The decision of the Court of Appeals for the Ninth Circuit in this case and the decisions of other Courts of Appeals refusing to enforce the Board's *Mid West*

Piping doctrine, would appear to be a conflict with the decisions of this Court that an employer may not intrude in matters of the self organization of employees. *ILGWU v. N.L.R.B.,* 366 U.S. 731, 737 (1961). *Ass'n. of Machinists, Lodge 35 v. N.L.R.B.,* 311 U.S. 72, 80 (1940). *N.L.R.B. v. Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261, 268 (1938).

The facts found by the Board in this case offer a dramatic illustration of the dangers involved in avoiding the Board's *Mid West Piping doctrine.* While the representation question existed between ILWU, and Local 5, the employer entered into a contract with ILWU, Local 142, covering not only the hotel in question, but six (6) other hotels operated by the employer. As a practical matter as a result of that contract and as a result of the employees of the Kona Surf being enveloped into a much larger bargaining unit extending throughout the Hawaiian Islands, the employees in question will never in the foreseeable future have an opportunity to make a free selection of their collective bargaining agent. Yet all of this was accomplished in the few days that the Kona Surf Hotel was open for business. The employees of the Kona Surf Hotel, without an election, will have no way to extricate themselves from a unit of thousands of other employees of the employer located in hotels hundreds of miles away.

The overlapping of authorization cards procured by ILWU and Local 5, demonstrates that a Board supervised election is the only way to insure the free selection of collective bargaining agents.

2. THE ISSUE NEEDS RESOLUTION BECAUSE IT HAS SUBSTANTIAL IMPACT ON NATIONAL LABOR RELATIONS POLICY AND INVOLVES UNNECESSARY, REPETITIOUS LITIGATION IN THE COURTS.

Since 1945, the NLRB, has adhered to its *Mid West Piping doctrine* that an employer is guilty of an unfair labor practice if he executes a contract with an uncertified union in the face of a substantial claim by another union. *Mid West Piping and Supply Company* (1945) 63 NLRB 1060.

Despite the long standing adherence of the NLRB to said doctrine, the Court of Appeals for the Ninth Circuit and certain other Courts of Appeals, have refused to enforce elections ordered on the basis of said doctrine, or unfair labor practice findings based on said doctrine.

The thirty year running conflict between the Board and the courts has resulted in a huge waste of administrative and judicial time and money. Despite setbacks in the courts, the Board persistently refuses to change its policy which we submit is the only proper way to effectuate our national labor policy of free selection of employee representatives.

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3. LOCAL 5 HAS STANDING TO CHALLENGE THE DECISION OF THE COURT OF APPEALS

The Petition for Certiorari also involves the issue of whether a charging party before the Board has standing to file a Petition for Certiorari where the NLRB does not file such a petition and where the charging party has a substantial interest in the case.

This issue appears to be one of first impression. The Petitioner respectfully submits that a charging party should have a right to appeal an adverse decision of a Court of Appeals despite the fact that the Board itself, for reasons which may have nothing to do with the merits of the cases, may elect not to pursue a Petition for a Writ of Certiorari.

CONCLUSION

The conflict between the NLRB and the courts should be resolved once and for all by a determination that the Board's determination of a showing of interest is an administrative matter not subject to direct or collateral attack.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, Honolulu, Hawaii,
April 21, 1975.

Respectfully submitted,
LAWRENCE I. WEISMAN,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 73-2464

National Labor Relations Board,
Petitioner,
vs.
Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel, and ILWU Local 142,
Respondents.

[November 26, 1974]

OPINION

Before: CHOY and SNEED, Circuit Judges,
NEILL,* District Judge.

SNEED, Circuit Judge:

This case involves a petition by the National Labor Relations Board under §10(e) of the National Labor Relations Act, 29 U.S.C. §160(e), for enforcement of its order directed against respondents, Inter-Island Resorts, Ltd., and the International Longshoreman's and Warehouseman's Union, Local 142, pursuant to

*Honorable Marshall A. Neill, Chief Judge, United States District Court, Eastern District of Washington, sitting by designation.

the Board's finding that they violated respectively, §§8(a)(1), (2) and (3) and (b)(1)(A) and (2).

There are no relevant facts in dispute since the Board's decision was based on a written stipulation of the facts entered by the parties. Inter-Island Resorts, Ltd., a Hawaii corporation which operates several hotels in that state. In 1970 Inter-Island began construction of the Kona Surf Hotel on the island of Hawaii. The hotel was scheduled to open in the early fall of 1971. In early September, 1971, respondent company formally hired and placed 95 employees on the Kona Surf payroll. The respondent union, which represented employees at six other hotels operated by Inter-Island, requested recognition as the exclusive bargaining representative of the employees, based on a cross-check of union authorization cards. The same day, another union, the Hotel Employees Union, filed a petition for a representation election with the Board, accompanied by 36 authorization cards, of which only 24 were valid.

Despite the Hotel Employees' petition, Inter-Island and ILWU met the next day at which time the latter submitted 87 authorization cards. Mack Hamada, Chairman of the Hawaii Public Relations Board, cross-checked the cards and approved 84 of them as valid. Inter-Island then recognized ILWU as the exclusive bargaining representative of the employees, and the parties entered into a collective bargaining agreement identical to a master agreement in effect at the six other hotels operated by Inter-Island. Pursuant to a decision by the Regional Director for the Board's 20th Region, an election was scheduled notwithstanding the

Inter-Island contract with ILWU. When the election to decide the issue of employee representation was held, 62 votes were cast for the ILWU, 27 votes were cast for the Hotel Employees Union and 1 vote was cast against both unions.

The crucial issue confronting this court on appeal is whether a real question of representation existed when Inter-Island recognized ILWU as the exclusive bargaining representative of the Kona Surf employees. This court and other United States Courts of Appeals which have dealt with the issue have consistently refused to find a violation of the National Labor Relations Act where an employer has recognized one of two unions competing for exclusive recognition on the basis of a clear demonstration of majority support. *NLRB v. Peter Paul, Inc.*, 467 F.2d 700, 702 (9th Cir., 1972); *see Playskool Inc. v. NLRB*, 477 F.2d 66, 70 (7th Cir., 1973); *Modine Manufacturing Co., Inc. v. NLRB*, 453 F.2d 292, 295 (8th Cir., 1971); *NLRB v. Air Master Corp.*, 339 F.2d 553, 557 (3rd Cir., 1964); *Suburban Transit Corp. and H.A.M.L. v. NLRB*, 499 F.2d 78, 80 (3rd Cir., 1974); *American Bread Co. v. NLRB*, 411 F.2d 147, 155-56 (6th Cir., 1969); *see also, International Ladies Garment Workers v. NLRB*, 366 U.S. 731, 739-740 (1961). The exception to the above rule is where the clear majority enjoyed by one of the competing unions is achieved by coercion or some other unfair labor practice. Here, however, the parties stipulated, to the fact that the respondent union did not employ coercive or other unlawful means in acquiring its authorization cards.

The Board's decision and order itself explicitly recognizes the conflict between its decision and the great weight of authority in the Courts of Appeals but mentions that it chooses to adhere to its view until such time as the United States Supreme Court has passed on the matter. *See* footnote 12 of the Board's Order 201 N.L.R.B. No. 1. The Board's position reflects its belief that the purposes and policies of the National Labor Relations Act require that the issue of representation be decided by the employees in a manner attended by the safeguards of the Board's election machinery. However, based upon the record before us indicating that the Inter-Island's recognition of the ILWU was based upon a clear demonstration of majority support, we conclude that the Board's need to preserve the integrity of its election machinery must yield to the rights of the Kona Surf employees to select and bargain through their own representatives. *See Playskool, Inc. v. N.L.R.B., supra,* 70.

Accordingly, the Board's petition for enforcement of its order is denied.

Appendix B

Before the
National Labor Relations Board

[¶24,948] INTER-ISLAND RESORTS, LTD., dba KONA SURF HOTEL and HOTEL, RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 5, AFL-CIO. Case No. 37-CA-689.

ILWU LOCAL 142 and HOTEL, RESTAURANT EMPLOYEES and BARTENDERS' UNION, LOCAL 5, AFL-CIO. Case No. 37-CB-147.

INTER-ISLAND resorts, LTD., OPERATOR OF KONA SURF HOTEL, and HOTEL, RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 5, AFL-CIO. Case No. 37-RC-1711.

201 NLRB No. 1.
January 10, 1973.

Before FANNING, JENKINS, JR. and PENELLO.

Assistance to Unions—Premature Recognition—Rival's Representation Petition—Sufficiency of Interest

An employer unlawfully gave, (and a union unlawfully accepted) recognition and maintained a union shop agreement at a time when a real question of repsentation existed, as shown by a representation petition that had been filed by a rival union. That the petition on file with the Board was not signed by

30 percent of the employees and was an insufficient showing of interest for an election did not negate the fact that the rival's claim was not clearly unsupportable and lacking in substance and was a showing of *some* interest. Section 8(a)(2) and (b)(1)(A).—Back reference ¶3570.8615.

Elections—Objections—Premature Recognition of Victor

An employer's premature recognition of a union while a question of representation existed, as evidenced by a rival's filing of a representation petition with the Board, was grounds for setting aside the election in which the aided union was the victor. Section 9(c).—Back reference ¶2791.84.

Board's Decision

An employer, engaged in the operation of a hotel, is charged with having violated Section 8(a)(2) and (3) of the Act by recognizing and effecting a union shop agreement with a union at a time when a real question of representation existed. A local of the Longshoremen's and Warehousemen's union (ILWU), which the employer recognized, is charged with having violated Section 8(b)(1)(A) of the Act by entering into the contract with the hotel and maintaining the union shop provisions.

The parties entered into a stipulation of facts and waived a hearing before an Administrative Law Judge. The Board approved the transfer of the proceeding to it for findings of fact and the issuance of a proper order.

The employer operates a chain of hotels in Hawaii. In 1970, it began construction of a new hotel, scheduled to open in September 1971. In August of 1971 the employer was asked by an agent of the ILWU to recognize it as the employees' representative based on the accretion of the new hotel to the existing unit of hotels in the state. The employer refused to do so, but agreed to recognition based on an authorization-card cross-check or an election.

Before the hotel opened, Local 5 of the Hotel, Restaurant Employees and Bartenders Union requested recognition based on authorization cards. Local 5 had previously notified the employer of its desire to represent employees at the new hotel.

Local 5 also filed a representation petition with the Board. The petition was rejected on the ground that the employer had not yet hired any employees. Local 5 then withdrew its petition and simultaneously filed a new one on the day the employer hired its workforce.

On the same day, several hours before the petition of Local 5 was filed, representatives of the ILWU met with the employer, requested recognition and arranged for a card check to be held the following day. The employer was informed that a new petition had been filed by Local 5, later that day.

The next day, a card check was conducted by a representative of the state labor relations board. Local 5 knew nothing of the check. It was found that a majority of employees had signed cards for the ILWU. A contract was then signed which was identical to the

existing "master agreement" between the ILWU and other hotels in the state. It contained a union shop clause and union security provision. Checkoff authorizations were passed to employees the same day.

Three days later, a conference was held in a Board office at which it was determined that Local 5 had submitted only 24 valid authorization cards—less than the 30-percent showing of interest necessary to warrant further processing of its petition. Local 5 was given 2 days within which to present the needed showing of interest. The next day, it presented 10 more cards, enough to meet the 30-percent requirement.

The Board directed an election in an appropriate unit of hotel employees. The employer requested review of the direction of election. Review was denied by the Board.

Meanwhile, after the hearing in representation case but prior to issuance of the Regional Director's decision, the employer and the ILWU entered into negotiations over wages of employees of its seven hotels. Employees of the new hotel were notified of the resulting agreement and that their wages would be increased retroactively.

A Board-conducted election was eventually held. The ILWU won. Local 5 then filed objections to conduct affecting the results of the election. A month later, the employer began deducting ILWU dues from employees' pay.

It was contended that the support and recognition given the ILWU by the employer discouraged member-

ship in Local 5 and interfered with employees' rights, since a real question of representation existed at the time the employer granted, and the union accepted, recognition.

The employer and union contended that their conduct was lawful because, at the time recognition was granted and a contract was executed, there did not exist a real question concerning representation, since the petition on file on the date recognition was granted was not supported by a sufficient showing of interest. Thus, argued the employer and ILWU, the employer was required to recognize and bargain with the ILWU under the Supreme Court's ruling in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 60 LC ¶10,150.

The Board has ruled, in *Milton Bradley Co., Playskool, Inc. Division,* 1972 CCH NLRB ¶23,932, that no precise numerical percentage has ever been established as a condition precedent to the existence of a real question concerning representation. The sole requirement necessary to raise such question is that the claim of a rival union must not be clearly unsupportable and lacking in substance.

In the present case, the claim of Local 5 was not unsupportable or lacking in substance. Moreover, the Board has repeatedly held that a showing of interest is an administrative matter, not subject to direct or collateral attack.

It was uncontroverted that at the time recognition was granted and the contract was executed, there was on file with the Board a petition supported by *some* showing of interest.

In the absence of any evidence that Local 5's petition was clearly unsupportable, it is found that, under the circumstances, the petition was sufficient to show more than a bare claim by Local 5 that it was seeking to represent the employees of the employer.

The employer was under no obligation, under the *Gissel* ruling, to recognize and bargain with the union when a question of representation existed.

Accordingly, it is found that the employer did unlawfully recognize and bargain with the union when a real question of representation existed and that it rendered unlawful aid and assistance to the union by recognizing it and by distributing checkoff authorizations to employees. Its actions were in violation of Section 8(a)(2) of the Act. It is also found that the employer violated Section 8(a)(3) of the Act by maintaining the union shop provisions.

Moreover, it is found that the union violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition and by enforcing the union shop provision in the contract.

Accordingly, since the parties are found to have violated the Act, the results of the election are set aside and a new election is ordered.

Appendix C

Supreme Court of the United States

No. A-665

Hotel, Restaurant Employees and Bartenders' Union,
Local 5, AFL-CIO,
Petitioners,

vs.

National Labor Relations Board, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 25, 1975.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 12th
day of February, 1975.

FILE
MAY 20
MICHAEL RODAK, JR

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1340

HOTEL, RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 5, AFL-CIO, *Petitioner,*

vs.

INTER-ISLAND RESORTS, LTD., d/b/a KONA SURF HOTEL, and ILWU, LOCAL 142,
and
NATIONAL LABOR RELATIONS BOARD, *Respondents.*

BRIEF FOR RESPONDENT ILWU LOCAL 142 in opposition to Petition for Writ of Certiorari

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1340

HOTEL, RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 5, AFL-CIO, *Petitioner,*

vs.

INTER-ISLAND RESORTS, LTD., d/b/a KONA SURF HOTEL, and ILWU, LOCAL 142,

and

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

BRIEF FOR RESPONDENT ILWU LOCAL 142 in opposition to Petition for Writ of Certiorari

Comes now ILWU Local 142, one of the respondents, and submits its brief in opposition to the Petition for Writ of Certiorari herein.

OPINIONS BELOW

The opinion of the National Labor Relations Board in NLRB Case Nos. 37-CA-689 and 37-CB-147 is ap-

pended to the Petition for Writ of Certiorari as Appendix "B" thereof.

The opinion of the Court of Appeals for the Ninth Circuit on the petition for enforcement filed by the National Labor Relations Board is appended to the Petition for Writ of Certiorari as Appendix "A" thereof.

The order of the National Labor Relations Board subsequent to the foregoing opinion of the Court of Appeals for the Ninth Circuit is appended to this Brief as Appendix "A".

JURISDICTION

Petitioner lacks standing to file a Petition for Writ of Certiorari. It was not a party to the enforcement proceedings in the Court of Appeals for the Ninth Circuit. It also neglected to file a motion to intervene in the proceedings thereafter for the purpose of filing a Petition for Writ of Certiorari. Furthermore, Respondent National Labor Relations Board has accepted the decision of the Court of Appeals as the law applicable to the case and has no petition pending before this Court.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court can entertain a petition for writ of certiorari filed by a petitioner who was not a party to proceedings before the Court of

Appeals and who has not filed a motion to intervene in the proceedings for the purpose of filing a petition for writ of certiorari;

2. Whether the Court should entertain a Petition for Writ of Certiorari in an unfair labor practice case where the National Labor Relations Board has accepted the decision of the Court of Appeals as the applicable law in the case and has not petitioned for certiorari;

3. Whether the Court should entertain a Petition for Writ of Certiorari where there is no conflict in the decisions of the various Courts of Appeals on the legal issue litigated in the unfair labor practice case;

4. Whether an employer and a labor organization commit an unfair labor practice by executing and giving effect to a collective bargaining agreement after the labor organization has clearly demonstrated its majority status, a status attained without coercive conduct, and after another labor organization has filed a petition for a representation election but has not demonstrated an interest sufficient to raise a question concerning representation under the procedures of the National Labor Relations Board.

STATEMENT OF CASE

The case was submitted to the Board on a written stipulation of facts and the fact summary from the decision of the Court of Appeals is a concise and correct summary of the facts. It reads:

"There are no relevant facts in dispute since the Board's decision was based on a written stipulation of the facts entered by the parties. Inter-Island Resorts, Ltd., is a Hawaii corporation which operates several hotels in that state. In 1970 Inter-Island began construction of the Kona Surf Hotel on the island of Hawaii. The hotel was scheduled to open in the early fall of 1971. In early September, 1971, respondent company formally hired and placed 95 employees on the Kona Surf payroll. The respondent union, which represented employees at six other hotels operated by Inter-Island, requested recognition as the exclusive bargaining representative of the employees, based on a cross-check of union authorization cards. The same day, another union, the Hotel Employees Union, filed a petition for a representation election with the Board, accompanied by 36 authorization cards, of which only 24 were valid.

Despite the Hotel Employees' petition, Inter-Island and ILWU met the next day at which time the latter submitted 87 authorization cards. Mack Hamada, Chairman of the Hawaii Public Relations Board, cross-checked the cards and approved 84 of them as valid. Inter-Island then recognized ILWU as the exclusive bargaining representative of the employees, and the parties entered into a collective bargaining agreement identical to a master agreement in effect at the six other hotels operated by Inter-Island. Pursuant to a decision by the Regional Director for the Board's 20th Region, an election was scheduled notwithstanding the Inter-Island contract with ILWU. When the election to decide the issue of employee representation was held, 62 votes were

> cast for the ILWU, 27 votes were cast for the Hotel Employees Union and 1 vote was cast against both unions."
>
> *NLRB v. Inter-Island Resorts, et al.*, 507 F.2d 411, 412.

Petitioner's statement also omits facts which the Court of Appeals thought crucial. The crucial paragraph from the fact stipulation reads:

> "During the entire period pertinent hereto, there is no evidence, nor does the General Counsel contend, that the Union authorization cards obtained by Respondent Union and relied upon by the Respondent Employer in granting recognition to the Respondent Union were obtained by any conduct which was coercive in nature or in any other way unlawful. It is further agreed that there is no evidence, nor does the General Counsel contend, that Respondent Employer unlawfully denied Charging Party equal access with Respondent Union to its employees for the purpose of obtaining authorization cards from Respondent Employer's employees. The alleged unlawful conduct on the part of Respondent Employer was its entering into a collective bargaining agreement with Respondent Union and thereafter administering the same as hereinabove set forth, at a time when a question concerning representation allegedly existed by virtue of the filing of a petition by the Charging party."
>
> NLRB Record, p. 74.

Petitioner further fails to mention that no question on the validity of the collective bargaining agreement was raised by itself or the Board at any time before respondent union won the Board-conducted election.

ARGUMENT

PETITIONER LACKS STANDING TO FILE A PETITION FOR WRIT OF CERTIORARI

Petitioner attempts to establish standing before the Court by bald assertions that the issue of a charging party's right to file a Petition for Certiorari "appears to be one of first impression" and that a charging party "should have a right to appeal an adverse decision of a Court of Appeals (Petitioner's Brief, p. 12)", citing neither precedent nor authority in support thereof.

Contrary to petitioner's contention, the issue of a charging party's standing to appeal has been determined. In *International Union, Local 283 v. Scofield,* 382 U.S. 205, 15 L.Ed.2d 272, 86 S.Ct. 373, one of the primary issues was whether successful charging parties in unfair labor practices proceedings before the National Labor Relations Board should be permitted to intervene in proceedings for review or enforcement of Board orders. The question was answered in the affirmative by the Court. In discussing the "rights typically secured to an intervenor in a reviewing court," the Court delineated the following rights attached to intervenor status:

> "to participate in designating the record; to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari"
>
> 382 U.S. 205, 215.

A charging party's rights on appeal are thus not in issue and it is not a lack of precedent which deprives petitioner of standing before the Court.

Petitioner as the successful charging party in the unfair labor practice proceeding elected not to intervene in the Board's petition for enforcement before the Court of Appeals for the Ninth Circuit. It further neglected to move for leave to intervene in the proceedings for the limited purpose of filing a Petition for Writ of Certiorari. Its own default, and not an absence of precedent or authority, stands as a bar to petitioner herein.

Under §1254(1) of the Judicial Code,[1] "only a 'party' to a case in the Court of Appeals may seek review" in the Supreme Court. *International Union, Local 283 v. Scofield,* 382 U.S. 205, 209; *Ex parte Leaf Tobacco Board,* 222 U.S. 578, 581, 56 L.Ed. 323. As petitioner neglected to intervene in the proceedings below, it has no standing to maintain this appeal. *Railroad Trainmen v. Baltimore and Ohio Railroad Co.,* 331 U.S. 519, 524, 91 L.Ed. 1646, 1650, 67 S.Ct. 1387, 1390. Interest in a case, of itself, cannot create a right to seek review of a decision of the Court of Appeals.

[1] 28 U.S.C. §1254(1).

THE BOARD HAS ACCEPTED THE DECISION OF THE COURT OF APPEALS AS THE APPLICABLE LAW AND THE COURT SHOULD NOT ENTERTAIN A PETITION FOR WRIT OF CERTIORARI FILED BY A CHARGING PARTY.

Subsequent to the decision of the Court of Appeals, the Board issued an order, attached to this Brief as Appendix "A", covering Case Nos. 37-CA-689, 37-CB-147, and 37-RC-1711, wherein it found "itself constrained to accept as the law of said cases" the decision of the Court of Appeals of the Ninth Circuit. This decision not to seek further review should not be disturbed by the Court.

The NLRB has been invested by Congress with exclusive power in the area of employee representation. "The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the 'exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment' ". *National Licorice Co. v. NLRB,* 309 U.S. 350, 362, 84 L.Ed. 799, 810. Where the Board in exercising its exclusive power and in its discretion and judgment has accepted the decision of the Court of Appeals "that the rights of the employees to select and bargain through their own representatives prevailed over the Board's desire to protect the integrity of its election machinery", this Court should not review said decision. The Board's tactical determination that the case is not "an appropriate vehicle to raise

important issues" must also be accorded due consideration. See: *International Union, Local 283 v. Scofield,* 382 U.S. 205, 221-222.

THERE IS NO CONFLICT IN THE DECISIONS OF THE VARIOUS COURTS OF APPEALS ON THE LEGAL ISSUE INVOLVED

Certiorari is a discretionary writ and the exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals has been sparingly exercised. Among the purposes for the exercise of such exceptional power is the resolution of an asserted conflict among the circuits on a particular issue. See: *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 10 L.Ed. 2d 308, 83 S.Ct. 1139; *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21, 13 L.Ed.2d 1, 85 S.Ct. 171.

Petitioner asserts no conflict among the various circuits on the legal issue involved. As the decision of the Court of Appeals and the cited cases indicate, the Courts "which have dealt with the issue have consistently refused to find a violation . . . where an employer has recognized one of two unions competing for exclusive recognition on the basis of a clear demonstration of majority support". *NLRB v. Inter-Island Resorts,* 507 F.2d 411, 412. The foregoing circumstances do not call for the use of the exceptional power of review.

THERE WAS NO UNFAIR LABOR PRACTICE COMMITTED BY RESPONDENTS INTER-ISLAND RESORTS, LTD., AND ILWU LOCAL 142.

Employees are accorded basic guarantees of freedom of choice and majority rule by the National Labor Relations Act in the selection of their collective bargaining representative. The unfair labor practices described in Section 8 of the Act are intended to facilitate the enforcement of the foregoing principles of freedom of choice and majority rule. Section 8 imposes a duty of neutrality upon the employer while employees are in the process of selecting a representative but when the choice of a representative by a majority of the employees has been made and proved to the employer, the duty becomes one of recognizing the majority choice. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 23 L.Ed.2d 547, 89 S.Ct. 1918; *NLRB v. Indianapolis Newspapers, Inc.*, 210 F.2d 501, 504. The requirement of employer neutrality to promote freedom of choice is displaced by a necessity to enforce majority rule through employer recognition of the majority representative.

This case involves a situation where the respondent union clearly demonstrated its majority status prior to recognition by respondent employer and the execution of a collective bargaining agreement. The majority support was achieved without resort to coercion or other unlawful means. The alleged basis of the unfair labor practice, the petition for a representation election of the charging party, although filed prior to the execution of the collective bargaining agreement, was unaccompaned by a showing of employee support

sufficient to warrant its processing under Board standards (See: Petitioner's Brief, Appendix 'A', p. viii). Under such circumstances, the basic guarantees of freedom of choice and majority rule could not have been abridged by respondents and their action in executing the agreement was in accord with the foregoing principles.

The decisive question in a case involving employee representation is whether there has been an uninfluenced expression of majority will. *Modine Manufacturing Co. v. NLRB,* 453 F.2d 292; *American Bread Co. v. NLRB,* 411 F.2d 147. Where such an expression is found, as in this case, Courts have not seen fit to hold contracting employers and unions in violation of the National Labor Relations Act. It is "interference with the employees' choice, not frustration of the Board's design to hold an election, which the statute proscribes as an unfair labor practice. And the latter is not necessarily determinative of the former". *NLRB v. Air Master Corp.,* 339 F.2d 553, 556.

The rationale for the reluctance of the Courts of Appeals to uphold unfair labor practice charges in the fact situation involved was succinctly stated by the Court of Appeals for the Seventh Circuit in *Playskool, Inc. v. NLRB,* 477 F.2d 66, where the Court said:

> "The courts, on the other hand, have generally refused to find a violation of §8(a)(2) where an employer has recognized one of two unions competing for exclusive recognition on the basis of a clear demonstration of majority support. N.L.R.B. v. Peter Paul, Inc., 467 F.2d 700

(9th Cir. 1972), Modine Manufacturing Co. v. N.L.R.B., 453 F.2d 292 (8th Cir. 1971), American Bread Co. v. N.L.R.B., 411 F.2d 147 (6th Cir. 1969), Iowa Beef Packers v. N.L.R.B., 311 F.2d 176 (8th Cir. 1964). The courts have reasoned that, in extending recognition to a union on such a showing, the employer has not 'coerced or interfered with' the minority union, but has merely obeyed the duty imposed upon him to recognize the agent which his employees have designated. N.L.R.B. v. Indianapolis Newspapers, Inc., 210 F.2d 501, 503 (7th Cir. 1954). Thus, many decisions recognize that, however important the need to preserve the integrity of the Board's election machinery, courts must protect the right of employees to select and bargain through their own representative without undue delay. Courts have also sought to implement the congressional purpose of promoting labor peace underlying the National Labor Relations Act, and have accepted a majority showing by the victorious union as a means of terminating the instability inherent in a representation contest and preventing a minority union from frustrating the majority will in order to gain campaigning time. N.L.R.B. v. Peter Paul, Inc., 467 F.2d at 702, N.L.R.B. v. Indianapolis Newspapers, Inc., 210 F.2d at 503, Getman, The Midwest Piping Doctrine: An Examination of the Need for a Reappraisal of Labor Board Dogma, 31 U.Chi.L.Rev. 292, 305 (1964)."

477 F.2d 66, 70.

Where majority status was clearly demonstrated prior to the execution of a collective bargaining agreement, the purpose of the National Labor Relations Act to protect the right of employees to select and

bargain through their own representative without undue delay has not been frustrated and no unfair labor practice has been committed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated, Honolulu, Hawaii,
May 14, 1975.

Respectfully submitted,
JAMES A. KING,
Attorney for Respondent
ILWU Local 142.

BOUSLOG & SYMONDS,
Of Counsel.

(Appendix "A" Follows)

Appendix "A"

Honolulu, Hawaii

United States of America
Before the National Labor Relations Board

Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel, and Hotel, Restaurant Employees & Bartenders' Union, Local 5, AFL-CIO, ILWU Local 142, and	Case 37-CA-689
Hotel, Restaurant Employees & Bartenders' Union, Local 5, AFL-CIO, Inter-Island Resorts, Ltd., operator of Kona Surf Hotel, Employer, and	Case 37-CB-147
Hotel, Restaurant Employees & Bartenders' Union, Local 5, AFL-CIO, Petitioner.	Case 37-RC-1711

Order

On September 3, 1971, the Petitioner filed a petition for an election herein in a unit consisting of all employees employed by the Employer at the Kona Surf Hotel, with certain exceptions. On September 4, 1971, the Employer, based upon a card check, granted recognition to ILWU, Local 142 as the exclusive collective-bargaining representative of the em-

ployees sought in the petitioned-for unit and thereafter executed a contract with said union covering those employees. On October 21, 1971, the Regional Director for Region 20 issued a Decision and Direction of Election directing an election in the aforesaid unit on the grounds that the contract did not bar the election since the petition's filing preceded its execution, and a question concerning representation existed when such contract was signed. On December 2, 1971, the Board denied the Employer's Request for Review, and on December 21, 1971, a Board-conducted election was held, resulting in 27 votes cast for the Petitioner, 62 votes cast for Local 142, and 1 vote cast for neither union, with 1 nondeterminative challenged ballot. On December 27, 1971, the Petitioner filed timely objections to conduct affecting the results of the election.

On January 26, 1972, the Petitioner filed unfair labor practice charges in Cases 37-CA-689 and 37-CB-147 against the Employer and Local 142, respectively, and on May 1, 1972, the Regional Director issued a consolidated complaint in said cases alleging that the above respondent parties were engaging in conduct violative of Sections 8(a)(3), (2), and (1) and 8(b)(4)(A) and (2), respectively, based upon the Employer's recognizing Local 142 and executing with it a contract containing a union security clause. On May 1, 1972, the Regional Director issued a supplemental Decision and Order herein in which, *inter alia,* he consolidated for hearing certain of the objections to the election with the unfair labor practice case described above.

On June 22, 1972, the Board issued an order aproving the parties' stipulation of facts and transferring the consolidated proceeding to it for an appropriate Decision and Order. On January 10, 1973, the Board issued its Decision, Order, and Direction of Second Election in said consolidated proceeding wherein it found, *inter alia,* that a real question concerning representation existed on September 4, 1971, when the Employer recognized and executed the collective-bargaining agreement with Local 142, and that, accordingly, the Employer rendered unlawful aid, assistance, and support to Local 142 in violation of Section 8(a)(2) of the Act.[1] Among other things, the Board ordered the Employer to withdraw recognition from Local 142 unless and until it was certified by the Board as the exclusive representative of the employees involved, and that the election conducted herein be set aside and a second election be held pursuant to its direction.

On November 26, 1974, the United States Court of Appeals for the Ninth Circuit denied the Board's petition for enforcement of its order in the related unfair labor practice matters, finding that no question concerning representation existed at the time the Employer recognized and entered into a contract with Local 142, and concluding, therefore, that the rights of the employees to select and bargain through their own representatives prevailed over the Board's desire to protect the integrity of its election machinery.

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[1]The Board also found the other violations alleged in the consolidated complaint.

The Board having duly considered the instant petition in the light of the Court's decision in the related unfair labor practice cases, a decision which the Board finds itself constrained to accept as the law of said cases, and having determined that no useful purpose would be served in further processing the petition herein.

It Is Hereby Ordered that Case 37-RC-1711 be, and it hereby is, severed from Cases 37-CA-689 and 37-CB-147, and that the petition in 37-RC-1711 be, and it hereby is, dismissed without prejudice to the Petitioner herein.

Dated, Washington, D. C., February 26, 1975.

By direction of the Board:

George A. Leet
Associate Executive Secretary

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1340

HOTEL, RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 5, AFL-CIO, PETITIONER

v.

INTER-ISLAND RESORTS, LTD., d/b/a KONA SURF HOTEL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Upon charges filed by petitioner Hotel Employees Union, the National Labor Relations Board found that respondent Inter-Island Resorts, Ltd. (the Company) and respondent International Longshoremen's and Warehousemen's Union (ILWU) had violated the National Labor Relations Act by entering into a collective bargaining agreement covering the Company's employees at a time when a petition for a representation election, filed by Hotel Employees and pending before the Board, was sufficient to raise a real question concerning the representation of those

employees (Pet. App. v-x). The court of appeals, finding that the question raised by the election petition was resolved by the clear showing of a card majority obtained by ILWU, declined to sustain the Board's findings and to enforce its order (Pet. App. i-iv). While the Board believes that the court of appeals erred, it did not file a petition for a writ of certiorari, for, in its view, the case does not warrant further review. The present petition is filed by Hotel Employees, the charging party before the Board.

2. While a charging party before the Board has the right to intervene in proceedings in the courts of appeals to enforce or review Board orders (*Auto Workers* v. *Scofield*, 382 U.S. 205), it does not become a party to a court of appeals proceeding absent such intervention. Hotel Employees never sought to intervene in, and thus never became a party to, the court of appeals proceeding here. Accordingly, it has no standing to seek certiorari. *Id.* at 209; cf. *Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 524.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JUNE 1975.